ATTORNEY AT LAW
CITY NATIONAL BANK BLDG.
ROOM 620
CHARLOTTE, N. C. 28202

RECEIVED
FEB 6 - 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

LARRY ALEXANDER WADDELL)
)
v.) CASE NO. 30
)
STATE OF NORTH CAROLINA) FROM MECKLENBURG COUNTY

FALL TERM, 1975

75-6168

INDEX

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE JUDGMENT AND DECISION OF THE SUPREME COURT OF NORTH CAROLINA IN THE CASE OF:

STATE OF NORTH CAROLINA	)	
	)	
V	)	CASE NO. 30
	)	
LARRY ALEXANDER WADDELL	)	FROM MECKLENBURG COUNTY
	)	
PETITIONER	)	FALL TERM, 1975

==========

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now comes the Petitioner, Larry Alexander Waddell, and through his Court appointed counsel, T. O. Stennett, and pursuant to the provisions of the North Carolina General Statute, par. 7 A-451 (b) (6) respectfully shows unto the Court:

1. That Petitioner, Larry Alexander Waddell was tried in the Mecklenburg County Superior Court of North Carolina on charges of first degree murder and armed robbery, was found guilty as charged, and on March 11, 1975 defendant appealed the judgment imposed to the Supreme Court of North Carolina;
2. That it was the opinion of the Supreme Court that no error in the record and proceedings of the said Superior Court existed;
3. That the Petitioner respectfully submits the Exceptions and Assignments of error in which involved the following questions;
   1. The Trial Court erred in failing to take judicial notice that an Order was outstanding declaring the defendant to be an outlaw, and thereby allowing defendant to be put to trial while he was still declared an outlaw by the State.
   2. The Trial Court erred in excusing the juror Stitt, which was abuse of the Court's discretion.

3. The Trial Court erred in not allowing defendant's Motion for a Judgment of Nonsuit at the close of the State's evidence and renewed at the close of all the evidence.

4. The Trial Court erred in overruling defense objection to questions propounded by the State where no evidence had been offered that would substantiate the asking, and where State was eliciting testimony desiring the jury to infer therefrom that defendant had murdered another person.

5. The Trial Court erred in failing to grant defendant's Motion in Arrest of Judgment.

4. That Petitioner, through his counsel, submits that error existed as to the constitutional questions involved in his Exceptions and Assignments of Error.

5. That Petitioner attaches hereto the Judgment and Decision of the Supreme Court of North Carolina, and respectfully submits that he has not had a trial in accordance with the law as the North Carolina Statute revealed the law to be on the date he was put to trial, and

WHEREFORE, Petitioner respectfully prays the Court that his petition for a writ of certiorari be granted and that this cause be certified for review by the Honorable Court.

This the 22 day of January, 1976.

T. O. STENNETT-ATTORNEY AT LAW
FOR PETITIONER LARRY ALEXANDER WADDELL
Room 520 City Natl Bank Bldg.
Charlotte, N. C. 28202
Phone: 333-8809--536-1528

Copies to:

Hon. Adrian J. Newton
Clerk of the Supreme Court of N.C.
P. O. Box 2170
Raleigh, N. C. 27602

Hon. Rufus L. Edmisten
Attorney General of N. C.
P. O. Box 629-Raleigh, N. C. 27602

Larry Alexander Waddell
835 W. Morgan St.
Raleigh, N. C.

2

NO. 37

TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Fall Term 1975

STATE OF NORTH CAROLINA

vs. From Mecklenburg

LARRY ALEXANDER WADDELL

ORDER FOR STAY OF EXECUTION

Petition having been filed by the defendant above named, through his attorney, T. O. Stennett of Charlotte, North Carolina, for a stay of execution of the judgment and death sentence rendered by the Honorable Lacy H. Thornburg at the January 6, 1975 criminal session of Mecklenburg County Superior Court, which judgment upon appeal was affirmed by the Supreme Court of North Carolina in its opinion filed December 17, 1975, and execution being scheduled on the third Friday following the filing of the opinion, which is January 2, 1976, and the defendant, through his attorney, having stated his intention to file a petition for a writ of certiorari in the United States Supreme Court;

NOW, THEREFORE, it is ordered that execution of the judgment be and the same is hereby stayed pending further orders of this court.

It is further ordered that the defendant remain in the custody of the Director of the Department of Correction pending further orders of this Court.

It is further ordered that a certified copy of this order be served on the Warden of Central Prison, Raleigh, N. C.

This the _____ day of December 1975.

Susie Sharp

CHIEF JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA.

3

Served by delivering a certified copy of this order to Warden Sam P. Garrison of Central Prison in Raleigh, North Carolina, this 22nd day of December 1975 at 1:50 p.m.

Marshal,
Supreme Court of North Carolina.

cc: Mr. T. O. Stennett, Attorney at Law
The Honorable James E. Holshouser
Mr. Jacob L. Safron, Jr., Assistant Attorney General

A TRUE COPY

CLERK

THURSDAY NOV 13 1975

No. 30

STATE

v

WADDELL

Branch, Justice - No Error

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

[illegible] NA

vs.

RY [illegible] ADDELL

Fall TERM, 1

No. 30 Mecklenburg

[illegible] argued upon the transcript of the record from the Superior Court Mecklenburg [illegible]y:

[illegible] Court is of opinion that there is no error in the record and proceedings of said [illegible] Court

is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the

[illegible] JOSEPH BRANCH Justice, be certified to the said Superior Court, to the intent that the

PROCEEDINGS BE HAD THEREIN INSAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

It is considered and adjudged further, that the DEFENDANT DO PAY

the costs of the appeal in this Court incurred, to wit, the sum of

$$ ****FORTY-TWO AND 00/100****** dollars ($ 42.00).

Execution issue therefor. Certified to Superior Court this 6th day of January 19 76 .

TRUE COPY A TRUE COPY

Clerk of Supreme Court of North Carolina

ADRIAN J. NEWTON

By: Mrs. Peggy N. Byrd Clerk of the Supreme Court

Deputy Clerk

BEST COPY AVAILABLE

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1975

STATE OF NORTH CAROLINA

v

No. 30 - Mecklenburg

LARRY ALEXANDER WADDELL

Appeal by defendant pursuant to G.S. 7A-27(a) from Thornburg, J., 6 January 1975 Session of the Superior Court of Mecklenburg County.

Defendant was charged in an indictment, proper in form, with the first-degree murder of Alma Bertram Wood.

The State's evidence, in summary, was as follows:

Mrs. Margaret Wood, wife of deceased, testified that on 12 July 1974 she and her husband worked at his dry cleaning establishment until about 6:30 p.m. Upon closing the establishment, they started to their automobile. Mr. Wood, armed with a pistol, was carrying a bag containing the day's receipts. They encountered defendant at their car who at that time uttered the word "Ha," and flipped some clothes from his arm revealing a sawed-off shotgun. He said "gimme the bag" and almost simultaneously with his demand, fired the shotgun toward Mr. Wood. Mrs. Wood observed defendant fleeing with the money bag and found her husband lying on his back with blood gushing from a wound in his neck. She identified State's Exhibit 5 as the pistol which her husband carried on that day. The witness, without objection from defense counsel, unequivocally identified defendant as the man who robbed and shot her husband with a sawed-off shotgun.

The State offered expert medical testimony to the effect that Mr. Wood died as a result of a wound inflicted by a shotgun, fired at close range.

Hazel Eugene Erwin testified that on 12 July 1974, he was driving by Mr. Wood's dry cleaning establishment when he heard a shot. He observed Mr. Wood stumbling backwards and saw a man wearing a lavender t-shirt and carrying a sawed-off shotgun grab a bag and flee to a nearby wooded lot.

Evelyn Byers testified that Eugene Johnson and Larry Waddell came to the house in which she lived with her mother shortly after 6:30 p.m. on 12 July 1974. She allowed defendant to use the telephone in the

2

Byers' residence and heard him ask for "Dot" and thereafter heard him give directions to the Byers' house and ask that he be picked up there. At that time defendant had an off-white drawstring money bag containing coins and currency. Johnson was carrying a plastic bag which contained a broken-down shotgun. After defendant finished his telephone conversation, he asked her to take his braided hair loose and comb it out. While she was unbraiding defendant's hair, he removed a pistol from his pocket. She identified State's Exhibit 5 as the pistol which she saw at that time. Upon her inquiry defendant told her that his name was Larry. The witness further testified that she heard Johnson ask defendant "Man, why did you shoot him?" Waddell responded "I seen him go for his gun." Shortly after this conversation defendant and Johnson left the house and rode away in a green car driven by an unidentified third person.

R. J. Whiteside, a Charlotte police officer, testified that Waddell was arrested for the murder of Alma Bertram Wood on 19 November 1974 in Apartment C-12 at 1701 West Boulevard, Charlotte, N. C. At the time of the arrest, Waddell was in the process of having his head shaved. The officer stated that he found two pistols in the apartment and one of the pistols was the one identified as State's Exhibit 5.

The State rested and defendant offered evidence tending to show the following:

Defendant testified that on 12 July 1974, at about 6:30 p.m., he met Ernest Johnson at the corner of Trade and Cedar Streets and Johnson inquired if he knew anyone who would give him a ride to Clanton Park. Upon his reply that he would have to make a telephone call, Johnson said that he knew a nearby place where the call could be made. They went to Evelyn Byers' house where Evelyn unbraided his hair and combed it out. He stated that he was not carrying anything with him at that time but that Johnson did have a package or a bag. He had no knowledge of its contents. He further stated that Eric Cunningham came by and gave them a ride to his (Waddell's) house. He denied he robbed or shot Mr. Wood.

John Alford, testifying for defendant, said that on 12 July 1974 he and Eric Cunningham picked up Waddell and Johnson at the Byers' home. Waddell was not carrying anything when he entered the car but Johnson was carrying a bag. When they arrived at Waddell's home, Johnson gave Waddell a gun and some money.

Marshall McCallum testified concerning a lineup procedure viewed by him and Mrs. Wood. We will consider this lineup procedure and the admissibility of the identification testimony more fully in the opinion.

Defendant moved for judgment as of nonsuit at the close of the State's evidence and at the close of the evidence for the defense. Both motions were denied.

The jury returned a verdict of guilty of first-degree murder and defendant appealed from judgment entered on the verdict imposing the death penalty.

Attorney General Rufus L. Edmisten, by Deputy Attorney General Jean A. Benoy and Associate Attorney David S. Crump, for the State.

T. O. Stennett for the defendant.

BRANCH, Justice.

Defendant first contends he was denied a fair trial because he was put to trial after an order was entered declaring him to be an outlaw pursuant to G.S. 15-48 and before the order was rescinded.

G.S. 15-48 provides:

> In all cases where any justice or judge of the General Court of Justice shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed, by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of law, the justice or judge is hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also empowering and requiring the sheriff of any county in the State in which such fugitive shall be to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the justice or judge shall direct; and if any person against whom proclamation has been thus issued continues to stay out, lurks and conceals

himself, and does not immediately surrender himself, any citizen of the State may capture, arrest, and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation of any crime.

Defendant seems to take the position that the order declaring him an outlaw should have been rescinded before his trial. Obviously the statute only applied so long as defendant remained at large. Neither statutory provision nor necessity requires the rescission of such order once defendant is in custody. Further the record reveals that evidence concerning defendant's having been declared an outlaw was initially and repeatedly disclosed by defendant's counsel. On two occasions during the voir dire examination of prospective jurors defense counsel referred to the defendant having been declared an outlaw. Defense counsel also elicited the same information from defendant on his redirect examination and from police officer Whiteside on cross-examination.

Defendant cannot invalidate a trial by introducing evidence or by eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State. State v. Cashill, 256 N.C. 652, 124 S.E.2d 873; State v. Williams, 255 N.C. 82, 120 S.E.2d 443; State v. Cane, 253 N.C. 130, 116 S.E.2d 429. Neither is invited error ground for a new trial. State v. Payne, 280 N.C. 170, 185 S.E.2d 101; Overton v. Overton, 260 N.C. 139, 132 S.E.2d 349.

It appears that it was a part of counsel's plan and theory of defense to inform the jury that defendant had been declared an outlaw. Defendant cannot now successfully contend that the trial judge committed prejudicial error because he did not, ex mero motu, object to experienced counsel's plan of trial. This assignment of error is overruled.

Defendant's Assignment of Error No. 4 is as follows:

The Trial Court erred in overruling defense objection to questions propounded by the State where no evidence had been offered that would substantiate the asking, and where State was

eliciting testimony desiring the jury to infer therefrom that defendant had murdered another person.

The questions directed to defendant's witness John Thomas Alford on cross-examination to which defendant excepts are found on page 86 of the record, to wit:

> Q. That was the day you looked at the customers in there and said, "Cracker, look at me and I will blow your head off."
> OBJECTION. NO RULING.
> A. I didn't say that.
>
> Q. You deny looking at a third customer and saying, "Donky, I am going to blow your God damned head off."?
> DEFENSE COUNSEL: Objection. No ruling.
> A. No, I didn't.
> DEFENSE COUNSEL: Objection. No ruling.
>
> Q. I will ask you if that wasn't the day you took a 38 --
> DEFENSE COUNSEL: OBJECTION.
> COURT: Let me hear this question.
> Q. I'll ask you if that wasn't the day you took a 38 automatic pistol and shot Gregory Leonard's heart out?
> OBJECTION. OVERRULED.
> A. No, I deny that.

A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. State v. Williams, 279 N.C. 663, 185 S.E.2d 174. The witness may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. State v. Gainey, 280 N.C. 366, 185 S.E.2d 874; State v. Jones, 278 N.C. 88, 178 S.E.2d 829; State v. Bell, 249 N.C. 379, 106 S.E.2d 485. However, the rule remains that a witness cannot be impeached by cross-examination as to whether he has been arrested for or indicted for or accused of an unrelated criminal offense. State v. Williams, supra. The scope of cross-examination rests largely in the trial judge's discretion and his rulings thereon will not be disturbed unless it is shown that the verdict is improperly influenced thereby. State v. Carver, 283 N.C. 179, 209 S.E.2d 785.

Examination of the questions asked the witness Alford on cross-examination shows that they inquired only into specific criminal and reprehensible conduct on his part. There is no showing of abuse of

discretion on the part of the trial judge as to the scope of the cross-examination or that the solicitor acted in bad faith.

All except one of the questions directed to the defendant Waddell and challenged by this assignment of error relate to his actions immediately before and during the alleged murder and robbery. Representative examples of those questions are as follows:

> Q. And that when Mr. and Mrs. Wood started walking out, you told Ernest Johnson to sit there on the wall and wait for you, that you would take care of it, and you walked across the street?
> DEFENSE COUNSEL: Your Honor, I object to this because there is absolutely no evidence been offered here that would be in line with these questions he is asking, and I don't think that it is proper.
> COURT: OVERRULED.
>
> DEFENSE COUNSEL: The District Attorney is soliciting testimony without having any evidence introduced to go on.
> COURT: Overruled, go ahead.
> A. I deny that.
>
> Q. And that Ernest Johnson sat over there on the wall across the street while you walked up to Mr. Wood and blew his neck off with a sawed-off shotgun?
> OBJECTION. OVERRULED.
> A. He didn't sat [sic] over there while I walked across the street. It didn't happen that way. I deny that we sat down to the corner of Cedar and Fourth Street and that we two got back together.

In this jurisdiction, cross-examination is not confined to the subject matter of direct testimony but may extend to any matter relevant to the case. State v. Huskins, 209 N.C. 727, 184 S.E. 480; State v. Allen, 107 N.C. 803, 11 S.E. 1016. We recognize this liberal practice for the purpose of allowing the cross-examiner to elicit details which might be favorable to his case, to bring out new and relevant facts and to impeach or cast doubt upon the credibility of the witness. 1 Stansbury's North Carolina Evidence (Brandis Revision) § 35, pps. 105, 107. Barnes v. Highway Comm., 230 N.C. 378, 109 S.E.2d 219.

We hold that the questions asked defendant on cross-examination were relevant and were within the allowable purposes of cross-examination.

This assignment also challenges the following question:

> Q. Just one more question, as a matter of fact, I will ask you if you didn't on the 27th day of June, 1974, take that same shotgun and walk up to Marion Dale Hodel at the Payless Service Station at 3800 Wilkinson Boulevard and say, "Gimme the money bag," and bash him in the head with that same sawed-off shotgun?
>
> DEFENSE COUNSEL: OBJECTION, Your Honor.
>
> A. I did not.

This question was only directed to whether defendant had committed a specific criminal act and the question was therefore proper.

Defendant next contends that the trial judge committed prejudicial error by excusing prospective juror Stitt.

During the voir dire examination of prospective jurors, both the defendant and the State accepted juror Stitt. Before impanelment of the jury, the District Attorney requested that he be allowed to further examine prospective juror Stitt. The District Attorney stated that Mr. Stitt's answers to defense counsel's voir dire questions had led the District Attorney to believe that he had misinterpreted Mr. Stitt's answers to the District Attorney's inquiries concerning the prospective juror's attitude toward imposition of the death penalty. The District Attorney, over defendant's objection, was allowed to make further inquiry. Mr. Stitt then stated that knowing that the death penalty would be imposed, he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt. Thereupon the trial judge, in his discretion, and at the request of the prospective juror, excused Mr. Stitt.

We have considered and decided the question presented by this assignment of error many times.

In State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572, after both the State and defendant had accepted a juror, but before the jury was impaneled, it came to the judge's attention that service on the jury would result in extreme family hardship to juror Foster. We held that the judge's action in excusing the prospective juror Foster in this murder trial did not constitute prejudicial error.

In State v. Harris, 283 N.C. 46, 194 S.E.2d 796, defendants were charged with murder. We there held that the trial judge did not commit

prejudicial error by allowing the State, over defendant's objections, to reexamine a prospective juror after she had been passed by both the State and defendant when before impanelment the juror let it be known that she had changed her opinion about capital punishment.

In the very recent case of State v. Wetmore, 287 N.C. 344, 215 S.E.2d 51, the trial judge allowed the solicitor to examine and challenge one prospective juror for cause and another prospective juror to be peremptorily challenged after both jurors had been passed by the State and defendant when it came to the court's attention before the jury's impanelment that one of the prospective jurors had formed an opinion as to defendant's guilt. It was also established that the other prospective juror was well acquainted with defendant and the defendant was a close friend of the prospective juror's son. We found no prejudicial error in the reexamination and excusal of these prospective jurors. Accord: State v. Atkinson, 275 N.C. 233, 167 S.E.2d 241; State v. Vann, 162 N.C. 534, 77 S.E. 295; State v. Vick, 132 N.C. 995, 43 S.E. 626.

Although the court exercised its discretion in excusing prospective juror Stitt, the answers given by the prospective juror concerning his attitude toward the death penalty could have supported an excusal for cause. See State v. Simmons, 286 N.C. 681, 213 S.E.2d 280; State v. Noell, 284 N.C. 670, 202 S.E.2d 750.

It is well established in this jurisdiction that it is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. State v. Harris, supra; State v. Atkinson, supra; State v. Vann, supra.

Defendant states in his brief that the systematic manouverings of the District Attorney excluded people of defendant's race. This

contention is not supported by the record. Defendant fails to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. See State v. Noell, supra; State v. Cornell, 231 N.C. 20, 167 S.E.2d 768. We hold that the trial judge properly excused juror Stitt.

Defendant assigns as error the trial judge's denial of his motions for judgment as of nonsuit. He argues that Mrs. Margaret Wood was the only identifying witness and that her testimony was not sufficient to support a finding by the jury that defendant was the perpetrator of the crime charged.

During the direct examination of Mrs. Wood, the District Attorney asked Mrs. Wood if she could identify the man who shot her husband. There was no objection by defense counsel. In response to this question, Mrs. Wood stated "I see the man in the courtroom today that I saw murder my husband with a sawed-off shotgun." She then pointed to defendant Larry Waddell to indicate the person who shot her husband. On cross-examination Mrs. Wood admitted that during the police lineup in which defendant participated she identified another man as being her husband's assailant. She explained her misidentification: "I did not identify him because he was disguised. His head was covered with a toboggan and pulled down over. He had lost weight. I could not see his head."

There was unquestionably ample evidence to carry the case to the jury if Mrs. Wood's in-court identification was properly admitted into evidence.

When the State offers evidence of identification and there is an objection and a request for a voir dire hearing, the trial judge should conduct a voir dire and hear the evidence from both the defendant and the State, find facts and determine the admissibility of the proffered evidence. State v. Accor, State v. Moore, 277 N.C. 65, 175 S.E.2d 583. Nevertheless our decisions require that there be at least a general objection in order to invoke voir dire proceedings. State v. Maxwell, 275 N.C. 714, 174 S.E.2d 534; State v. Cook, 280 N.C. 642,

187 S.E.2d 104. However, in capital cases it is our practice, despite counsel's failure to observe recognized rules, to carefully examine the record for prejudicial error. We, therefore, elect to further consider the admission of the unchallenged identification testimony.

The record shows that several weeks after the killing, Mrs. Wood was shown about fifteen photographs of young black males and at that time she picked the photograph of defendant Waddell as a photograph of the person who robbed and killed her husband. This evidence was initially brought out by defense counsel and the above summary represents all we find in the record concerning the photographic identification.

We do not extend the right of counsel's presence to out-of-court examinations of photographs which include a suspect, whether he be in custody or at liberty. State v. Accor, State v. Moore, supra. Nor do we find anything in this record which indicates that the out-of-court photographic identification was unlawful and impermissibly suggestive. Thus the in-court identification was not tainted by the out-of-court photographic identification.

Our search of the record also discloses that a lineup was conducted on 20 November 1974 and that defendant was one of the persons in the lineup.

It is well settled that lineup procedures which are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" violate due process and are constitutionally unacceptable. Simmons v. United States, 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967; State v. Smith, 278 N.C. 476, 180 S.E.2d 7; State v. Austin, 276 N.C. 391, 172 S.E.2d 507. It is also established by decisions of this Court and the federal courts that an accused must be warned of his right to counsel during such confrontation and unless presence of counsel is understandingly waived testimony concerning the lineup must be excluded in absence of counsel's attendance. Further if there be objection to an in-court identification by a witness who participated in an illegal lineup procedure, such evidence must be excluded unless it be determined on voir dire that the in-court identification is of independent origin and therefore not tainted by

the illegal lineup. Gilbert v. California, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951; United States v. Wade, 388 U.S. 218, 18 L.Ed.2d 1149, 87 S.Ct. 1926; State v. Smith, supra.

In the instant case defense counsel again elicited information concerning the lineup and later offered as a defense witness, Marshall McCallum, an attorney who practices in Charlotte, N. C. Mr. McCallum testified that he attended the lineup on 20 November 1974 and that "he was requested to view the lineup by an attorney who was representing Waddell's interest." He also represented another person who appeared in the lineup. He stated that the lineup which he and Mrs. Wood viewed consisted of six black males of approximately the same age and the same height. They were all dressed in t-shirts, dark pants and green toboggans. Each of the men came towards the viewing partition and made a complete turn so as to expose both sides of his face. During the lineup Mrs. Wood requested that Waddell say "Gimme the bag." She also requested that James Nealy, one of the men in the lineup, be asked to repeat the same phrase. Both men complied and Mrs. Wood thereafter identified Nealy as the man who robbed and killed her husband. This record discloses absolutely no evidence that the lineup as conducted was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Further the uncontradicted evidence shows that an attorney representing defendant's interest was present to view the lineup. Thus there was no illegal lineup to infect the in-court identification.

The fact that Mrs. Wood failed to identify defendant at the lineup, and in fact identified another person as her husband's murderer goes to the weight rather than the competency of the testimony and is a matter for the jury. State v. Bass, 280 N.C. 435, 186 S.E.2d 384; State v. Hill, 278 N.C. 305, 180 S.E.2d 21; Lewis v. United States, 417 F.2d 755.

We are of the opinion that had there been a voir dire procedure the evidence which appears in this record would have supported a ruling admitting Mrs. Wood's identification testimony into evidence. In our search for possible prejudice in the admission of this evidence, we also

note that the evidence of Mrs. Wood's misidentification at the lineup would seem to have been favorable to defendant. Finally if the witness Wood had not testified as to defendant's identity, there was other sufficient substantial evidence as to every element of the crime charged to repel defendant's motions for judgment as of nonsuit.

Mrs. Wood testified that her husband was robbed and was killed by a shotgun wielded by a black man at about 6:30 p.m. on 12 July 1974. She generally described this man and the clothes he was wearing. Mrs. Wood stated that her husband carried money in a "white cloth bag with . . . two tie strings that came together." The witness Byers testified that defendant and Eugene Johnson came to her house shortly after 6:30 p.m. on 12 July 1974. Defendant was carrying a white drawstring money bag containing coins and currency. Johnson was carrying a shotgun. While defendant was in her home and while she was unplaiting his hair, he removed a pistol from his pocket. She identified this pistol at trial and the witness Wood identified the same pistol as the pistol her husband was carrying on the day that her husband was killed and robbed. The same pistol was found in the apartment where defendant was apprehended and arrested. Witness Byers further testified that she heard Johnson ask Waddell, "Man, why did you shoot him?" Waddell responded "I seen him go for his gun." Defendant testified and admitted that he was in the vicinity in which the crime occurred at approximately the time of the crime. He further admitted that he was in the home occupied by the witness Byers on the same date shortly after 6:30 p.m.

Thus, applying the well recognized and often repeated rules governing the granting or denial of motions for judgment as of nonsuit, we hold that the trial judge properly denied defendant's motions for judgment as of nonsuit.

The Attorney General filed a "caveat" to his brief in which, acting as an officer of the Court, he calls to our attention, without citation of authority, several matters which he suggest we should consider ex mero motu.

The State suggests that the trial judge should have, without

request by defense counsel, instructed on the law of alibi.

We formerly held that when a defendant offered evidence of alibi it was incumbent upon the trial judge to charge as to the legal effect of such evidence without a request by defendant for such instructions. State v. Spencer, 256 N.C. 487, 124 S.E.2d 175. However, since the decision in State v. Hunt, 283 N.C. 617, 197 S.E.2d 513 (filed 12 July 1973), the trial judge is not required to instruct on alibi unless defendant specifically requests such instruction. Further, unless there is evidence that the accused was at some other specified place at the time the crime was committed, the evidence would not require a charge on alibi even had there been a request for such charge. Neither does a mere denial that he was at the scene of the crime require the charge. In such case, the general charge that the jury should acquit the defendant unless it is satisfied beyond a reasonable doubt that the defendant committed the crime is sufficient. State v. Green, 283 N.C. 690, 151 S.E.2d 606. Here a cursory reading of the record would show that the crime was committed at the corner of Trade and Cedar Streets in the City of Charlotte on 12 July 1974 at approximately 6:30 p.m. Defendant Larry Waddell testified that he was on the corner of Trade and Cedar Streets on 12 July 1974 at around 6:30 p.m. Thus there was insufficient evidence to require the instruction on alibi even had there been a special request for it.

The State also points to the failure of the trial judge, without request of defense counsel, to give a cautionary instruction that evidence concerning defendant having been declared an outlaw should not be considered as evidence of guilt. We doubt that such an instruction would have been beneficial to defendant. It is altogether possible that the instruction by the trial judge would have magnified rather than diminished the harmful effect of the evidence which had repeatedly been elicited by defense counsel.

Finally one of the matters to which the State directs our attention is whether the trial judge should have assumed greater responsibility in the control of the trial. We join in the State's concern that the trial judge, the prosecutor, the appellate courts as

well as defense counsel should strive to give every accused a fair trial. However, it must be borne in mind that criminal trials are adversary in nature and to require a trial judge to unduly intrude into counsel's plan of trial, to constantly interpose objections or to guess whether counsel desires voir dire hearings when counsel remains silent would prolong ad infinitum trials and final judgments in criminal cases. Such requirements would weight the scales of justice to the criminal and retard fair and speedy trials. The State, as well as defendant, is entitled to a fair trial.

Defendant's contention that judgment should be arrested because the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected by this Court in many recent decisions. We do not deem it necessary to again set forth the exhaustive reasoning of these cases. State v. Robbins, 287 N.C. 483, 214 S.E.2d 736; State v. Stegmann, 286 N.C. 638, 213 S.E.2d 262; State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844; State v. Dillard, 285 N.C. 72, 203 S.E.2d 6; State v. Henderson, 285 N.C. 1, 203 S.E.2d 10; State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721; State v. Waddell, 282 N.C. 431, 194 S.E.2d 19.

Our careful search of this entire record discloses no error warranting a new trial.

No error.

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

LARRY ALEXANDER WADDELL)
)
V,)
)
NORTH CAROLINA)

FORMA PAUPERIS AFFIDAVIT

I OWN NOTHING OF VALUE:

LAND ---------- 0 ---------- $ NONE

AUTOMOBILE AND PERSONAL PROPERTY ---------- 0 ---------- NONE

BANK DEPOSITS ---------- 0 ---------- NONE

MONEY ---------- 0 ---------- NONE

I certify that I am a pauper and unable to pay cost and fee or give security therefor to prosecute the petition for a writ of certiorari.

I request leave to proceed in forma pauperis.

/s/ Larry Alexander Waddell

Larry Alexander Waddell-Affiant and Petitioner

Sworn to and subscribed to before me,

this the 22 day of January, 1976.

Edward E. Hodge

Notary Public

My commission expires: My Commission Expires October 6, 1980

EDWARD E. HODGE NOTARY PUBLIC WAKE COUNTY N.C.

20

FILED

FEB 2 1976

10 O'CLOCK A M

CLERK OF SUPERIOR COURT

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 74-CR-70393

STATE OF NORTH CAROLINA	)	
	)	MOTION FOR THE APPOINTMENT OF
V.	)	
	)	COUNSEL TO SEEK FURTHER
LARRY ALEXANDER WADDELL	)	
Defendant	)	APPELLATE REVIEW In Forma Pauperis
	)	

TO: THE HONORABLE PRESIDING OR RESIDENT JUDGE OF MECKLENBURG COUNTY SUPERIOR COURT:

NOW COMES LARRY ALEXANDER WADDELL, the defendant in the above entitled cause, respectfully Moving the Court, that pursuant to North Carolina General Statute 7A-451 (b)(6), and Article I, Section 19 of the North Carolina Constitution and Section I of the Fourteenth Amendment to the United States Constitution, that counsel be appointed to seek further review of this cause in the United States Supreme Court, and in support of such Motion, respectfully shows unto the Court:

1. That defendant was tried at the March 10, 1975 Regular Schedule "A" Session of the Mecklenburg County Superior Court, upon the charge of First degree murder and armed robbery, that he was convicted and sentenced by the Honorable Lacy H. Thornburg, Judge Presiding, to be put to death in the State's gas chamber. That in apt time Notice of Appeal was given and duly noted.

2. That defendant was represented on the appeal to the North Carolina Supreme Court by T. O. Stennett.

3. That North Carolina General Statute 7A-451(b)(6), provides for the appointment of counsel to an indigent to seek "review by the United States Supreme Court of final judgments or decrees rendered by the highest Court of North Carolina in which decision may be had".

4. That the State Supreme Court, by decision of no error entered in this cause on or about December 17, 1975 denied any relief to the defendant.

5. That the defendant, in good faith, believes the denial of relief to him on the appeal, to be in conflict with applicable decisions of the United States Supreme Court governing the matters contained in the appeal.

6. That the defendant is entitled to the appointment of counsel to seek review in the United States Supreme Court of the denial of relief by the State Supreme Court in this matter on December 17, 1975.

WHEREFORE, it is now respectfully Moved and Prayed, that the Court will appoint counsel for the defendant to seek review in the United States Supreme Court of the denial of relief on the appeal in this matter by the Supreme Court of North Carolina on December 17, 1975.

This the 23 day of January, 1976.

/s/ Larry Waddell
Larry Alexander Waddell-Defendant, pro se,
in propria persona.

STATE OF NORTH CAROLINA)
)
WAKE COUNTY)

VERIFICATION

LARRY ALEXANDER WADDELL, being first duly sworn on oath represents that he has subscribed to the above and states that the information contained therein is true and correct to the best of his knowledge and belief.

/s/ Larry Waddell
Larry Alexander Waddell ---- Affiant

NORTH CAROLINA)
)
WAKE COUNTY)

FORMA PAUPERIS AFFIDAVIT

I own nothing of value except the following:

	Value
Land ---None--- $	NONE
Automobile and Personal Property None	NONE

23

Bank Deposits ---NONE--- $ NONE

Money ---NONE--- $ NONE

I certify that I am a pauper and unable to pay costs and fees or give security therefor to prosecute this petition or to pay for the services of counsel to seek review of the denial of relief on my appeal in the United States Supreme Court. I am an indigent and entitled to the appointment of counsel pursuant to N.C.G.S. 7A-151(b)(6) for this purpose. I request leave to proceed in forma pauperis with the appointment of counsel.

/s/ Larry Alexander Waddell
Larry Alexander Waddell---- Defendant

Larry Alexander Waddell, being first duly sworn on oath represents that he has subscribed to the above and states that the information contained therein is true and correct to the best of his knowledge and belief.

/s/ Larry Alexander Waddell
Larry Alexander Waddell --- Affiant

The VERIFICATION and FORMA PAUPERIS AFFIDAVIT
SWORN TO AND SUBSCRIBED BEFORE ME
THIS 23 day of January, 1976.

Paul A Hughes
Notary Public

My commission expires My Commission Expires April 11, [illegible]

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Case No. 74-CR-70393

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
LARRY ALEXANDER WADDELL,)
Defendant)

THIS CAUSE coming on to be heard and being heard before the undersigned Resident Judge of the 26th Judicial District, the Court having taken under consideration the above-named defendant's motion for appointment of counsel to seek further appellate review of the decision of the Supreme Court of North Carolina, and the undersigned being of the opinion that there is no authority contained in the General Statutes of North Carolina for the appointment of counsel for the purposes of seeking a review of the above-entitled matter before the Supreme Court of the United States;

THE COURT does find as a fact, based upon the affidavit of the said Larry Alexander Waddell, that he is an indigent and would otherwise be entitled to appointment of counsel for the purposes of prosecuting an appeal to the United States Supreme Court in the form of a petition for writ of certiorari, if authority were contained in the statutes of North Carolina for the appointment and payment of counsel.

BASED UPON THE FOREGOING, the petition of Larry Alexander Waddell for appointment of counsel to apply to the Supreme Court of the United States for a writ of certiorari in the above-entitled matter be and the same is hereby DENIED.

This the 2nd day of February, 1976.

William T. Grist

William T. Grist, Resident Judge
26th Judicial District of North Carolina

2

75-6168

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

LARRY ALEXANDER WADDELL,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

ON PETITION FOR

WRIT OF CERTIORARI TO

THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General

JEAN A. BENOY
Deputy Attorney General

DAVID S. CRUMP
Associate Attorney General

Counsel for the State of
North Carolina,
Respondent

Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-3786

INDEX

TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6163

LARRY ALEXANDER WADDELL,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

ON PETITION FOR

WRIT OF CERTIORARI TO

THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT,

STATE OF NORTH CAROLINA

IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 288 N. C. _____, 220 S.E.2d 293 (1975), and is appended to Petitioner's Petition as an Appendix, appearing at pages 5 to 20.

JURISDICTION

Presumably the Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW IN THAT PETITIONER HAD BEEN DECLARED AN OUTLAW AND IN THAT NO ORDER QUASHING THE OUTLAWRY PROCLAMATION WAS ENTERED BEFORE PETITIONER WAS PUT TO TRIAL.

II

WHETHER THE TRIAL COURT DENIED THE PETITIONER DUE PROCESS OF LAW IN EXCUSING THE VENIREMAN STITT.

III

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE TRIAL COURT FOUND THE STATE'S EVIDENCE SUFFICIENT TO SUBMIT TO THE JURY.

IV

WHETHER THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW WHEN IT OVERRULED PETITIONER'S OBJECTION TO QUESTIONS ASKED BY THE STATE OF PETITIONER'S WITNESSES ON CROSS-EXAMINATION.

V

WHETHER THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW IN REFUSING PETITIONER'S MOTION IN ARREST OF JUDGMENT, MADE ON THE GROUNDS THAT THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT, PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has not identified the Constitutional and statutory provisions which he seeks to invoke. Respondent, with all deference, presumes that the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States form the basis of petitioner's request for review.

Respondent presumes that the statutory provisions which petitioner would have the Court review are:

> §14-17. Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison. (1893, cc. 85, 281; Rev., s. 3631; C.S., s. 4200; 1949, c. 299, s.1; 1973, c. 1201, s.1.)

§15-48. Outlawry for felony. - In all cases where any justice or judge of the General Court of Justice shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of law, the justice or judge is hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also empowering and requiring the sheriff of any county in the State in which such fugitive shall be to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the justice or judge shall direct; and if any person against whom proclamation has been thus issued continues to stay out, lurks and conceals himself, and does not immediately surrender himself, any citizen of the State may capture, arrest, and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation of any crime. (1866, c.62; 1868-9, c. 178, subch. 1, s.8; Code, s. 1131; Rev., s.3183; C.S., s. 4549; 1969, c. 44, s. 30; 1973, c. 1141, s. 9.)

§15-187. Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor. (1909, c. 443, s. 1; C.S., s. 4657; 1935, c. 294, s.1.)

§15-188. Manner and place of execution. - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this Article. (1909, c. 443, s. 2; C.S., s. 4658; 1935, c. 294, s.2.)

STATEMENT OF THE CASE

Petitioner, Larry Alexander Waddell, was tried at the March 10, 1975 regular schedule "A" Session of Criminal Superior Court, in Mecklenburg County North Carolina on an indictment charging that he "did kill and murder Alma Bertram Wood...." On March 11, 1975 the jury returned a verdict finding petitioner guilty of murder in the first degree and petitioner appealed to the Supreme Court of North Carolina. In its opinion, filed December 17, 1975 the Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death.

STATEMENT OF FACTS

On July 12, 1974 Mrs. Margaret Wood and her husband, Alma Bertram Wood operated a dry cleaning business in Charlotte, North Carolina (R p 55). About 6:30 p.m. the Woods closed the store for the day (R p 56). Mr. Wood had the day's receipts in a white drawstring bag (R pp 56, 57). As the Woods approached their car a man on the sidewalk said "Ha", drawing Mrs. Wood's attention (R p 56). The man had what appeared to be dirty clothes in his arms. He stepped up to Mr. Woods, threw the clothes to one side, revealing a sawed-off shotgun, said "Gimme the [money] bag," and shot (R p 56). He then fled with the money bag. The man was later identified by Mrs. Woods as the defendant, Larry Alexander Waddell (R pp 57; 62-66; 81-84). Mr. Wood died as the result of a massive shotgun wound (about three inches at the largest point) at the left base of the neck (R p 75).

ARGUMENT

The petition in this case does nothing other than restate the assignments of error argued by the present petitioner in the Supreme Court of North Carolina. Respondent is of the opinion that the Opinion of the Supreme Court of North Carolina fully, fairly and ably responds to petitioner's contentions, at least three of which do not, in our view, rise to the dignity of Constitutional questions.

THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER WAS PREJUDICED BY BEING PUT TO TRIAL, NO ORDER HAVING BEEN ENTERED QUASHING THE OUTLAWRY PROCLAMATION WHICH HAD BEEN ENTERED AGAINST HIM.

The homicide which was the subject of the present prosecution took place on July 12, 1974. On October 16, 1974 the Assistant District Attorney for the Twenty-Sixth Judicial District filed an affidavit reciting that petitioner: (1) was charged with the murder of Alma Bertram Wood; (2) was sought as a suspect in the murder of Marion Dale Kotel; (3) had been identified as a participant in an armed robbery; (4) fled from justice and concealed himself; (5) [was] "a dangerous and violent man and that he is a danger to the various citizens of the community." On the same day the Honorable Sam J. Ervin, III entered the order authorized by N. C. Gen. Stat. §15-48. Petitioner was not apprehended until November 19, 1974.

In the State Supreme Court petitioner argued that because he had been declared an outlaw and because the order proclaiming him an outlaw had not been rescinded, petitioner's status as an outlaw came to the attention of the jury. Because this information came to the attention of the jury, petitioner claimed, he had been robbed of his rights to a fair and impartial trial before an unbiased jury and his right to be presumed innocent.

The record discloses the insubstantiality of this contention. The jury was informed four times that petitioner had been declared an outlaw, and each such instance was by action of petitioner's own counsel. During the voir dire of the jury venire by petitioner's counsel the following colloquy took place between juror Broadway and counsel:

> Q. If I were to tell you that this defendant here has been declared an outlaw, prejudged by the Judge and signed an Order declaring him an outlaw and he stands now before you charged as an outlaw, would that have any effect on your verdict in the end?
> A. No, sir.
>
> Q. In other words, the fact that he has already been prejudged, so to speak, pertaining to this case, you could disabuse your mind of that and give him a fair and impartial trial?
> A. If there was a reasonable doubt, it wouldn't affect my decision.
> (R p 21-22)

Juror Broadway was passed by the State and the petitioner and sat on the jury which convicted petitioner.

The following colloquy took place between petitioner's counsel and juror Woollen, who was later excused by the Defendant:

> Q. The little bit that you read about it, did you read about him being declared an outlaw and all of that and a lot in the paper about it?
> A. No.
> (R p 25)

The narration of the testimony of R. J. Whiteside, the arresting officer, on cross-examination by petitioner's counsel discloses that he, too, was asked about the outlawry proclamation:

> I did not sign the affidavit that got Waddell declared an outlaw. I do not know who did. I knew at that time Waddell had been declared an outlaw.
> (R p 77-78)

Petitioner was asked on redirect examination, by his own counsel, about the outlawry proclamation, and petitioner made the following damaging admission:

> I knew at the time I was hiding out that I had been declared an outlaw.
> (R p 89)

In the State Supreme Court, present counsel for the State, acting as officers of the Court, admitted that the matter of outlawry, had it been brought to the attention of the jury by the State, would have afforded grounds for a new trial. The State never mentioned that matter at trial, and the Supreme Court of North Carolina correctly pointed out that any wrong done petitioner in the matter was self-inflicted.

II

THE JUROR STITT WAS PROPERLY EXCUSED FROM THE PETIT JURY.

Petitioner contended in the State Supreme Court that the trial court improperly excused the juror Stitt because of the juror's opposition to capital punishment. He further contended, without support of the record, that juror Stitt was the last black called, and that the exclusion of juror Stitt violated his right to trial by a jury of his peers.

Witherspoon v. Illinois, 391 U.S. 510 (1968) establishes (1) that veniremen may not be excluded for cause simply because they voice general objection to the death penalty or voice conscientious or religious scruples against its infliction; and, (2) that veniremen who are unwilling to consider all of the penalties provided by law and who are irrefutably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial may be challenged for cause on that ground. During the voir dire of this jury, the District Attorney addressed the Witherspoon questions to the panel in the box (R p 17) and seems to have gotten satisfactory answers to those questions. When petitioner asked the juror about his beliefs in capital punishment (R p 36) the juror responded that he did not believe in it. The court, acting in its proper discretion allowed the District Attorney to examine juror Stitt on his contradictory answers (R p 39). During the course of the further examination the District Attorney advised the juror at length that the sole function of the jury was to determine guilt or innocence, not the penalty (R p 41). The juror responded (R p 41):

> Q. So as I understand what you are telling me, because of your religious beliefs, even if you were satisfied that he was guilty, you could not vote to find him guilty, if you knew that the death penalty would be the results?
> A. That is just about the way. I don't feel like I could.
> Q. I appreciate your honesty. Your Honor, the State would challenge Mr. Stitt for cause.
> MR. STENNETT: I object to this, Your Honor. He has already been accepted by the State and by me, by the defendant.
>
> Q. Your Honor, I think in the questioning of Mr. Stitt -
> A. I would like to say this, if I am in order. Now, I have never sat on a jury before. Now, I must say that it is quite a bit confusing. It is something new to me. I may be saying something that, in other words, if I was to hear the case, but, now, as far as the death penalty, I don't know whether I could go along with it or not, no matter what the law.
> (R p 41)

The Court advised juror Stitt of his duty to follow the law, but the juror asked to be excused. The court refused the State's challenge for cause and excused the juror "in [his] discretion and at the request of the juror." The juror's answers were unequivocal - irrespective of what the evidence might show, he would not vote for a first-degree conviction knowing that the death penalty would result from the verdict.

The record does not support the argument that juror Stitt was removed from the jury on account of his race--or even show what his race was. The law does not, however, give petitioner the right to have a member of his own race on the petit jury, but requires a showing of an arbitrary and systematic exclusion of blacks. As the Supreme Court of North Carolina said in State v. Noell, 284 N.C. 670, 682, 683, 202 S.E.2d 750, 758, 759 (1974):

> Defendant's mere showing that all Negroes in this case were challenged by the solicitor is not sufficient to establish a prima facie case of an arbitary and systematic exclusion of Negroes. The record is silent about any prior instances in which the solicitor challenged Negroes from the jury. The defendant has the burden of showing such arbitary and systematic exclusion, and he has failed to carry that burden.
>
> **********
>
> A defendant has no right to be tried by jury containing members of his own race or even to have a respresentative of his own race to serve on the jury. Defendant does have a right to be tried by a jury from which members of his own race have not been systematically and arbitarily excluded. The burden is upon the defendant, however, to establish racial discrimination in the composition of the jury. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

III

THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT AS IN THE CASE OF NONSUIT.

The motion for judgment as in the case of nonsuit is the same as a demurrer to the evidence, N. C. Gen. Stat. § 15-173, or a motion to dismiss the indictment, State v. Cooper, 275 N.C. 283, 167 S.E.2d 266 (1969), or a motion for a directed verdict of not guilty, State v. Kolton, 284 N.C. 391, 200 S.E.2d 612 (1973). The motion challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support a verdict of guilty of the offense charged, State v. Vaughan, 268 N.C. 105, 150 S.E.2d 31 (1966). The only question which petitioner sought to raise in connection with the assignment of error was a question of the sufficiency of the evidence of the identity of petitioner as the perpetrator of the murder. The evidence of identity in this case is strong. Mrs. Wood, the victim's wife, who was present at the scene of the killing and testified as to her opportunity to observe the killer identified petitioner in court as the killer. She had participated in two out of court identifications. The first out of court identification involved the selection of a photograph from a group of about fifteen photographs. Mrs. Wood, selected a photograph of petitioner. The second of these was a line up identification. There Mrs. Wood identified another person as the perpetrator of the offense. She explained in some detail the reasons for her misidentification, as the North Carolina Supreme Court's opinion explains, 220 S.E.2d 302. As the opinion of the State Supreme Court explains, there was also strong circumstantial identification in the testimony of Evelyn Byers 220 S.E.2d 302. Petitioner raises no question of a violation of his Constitutional rights at either out of court identification. No Constitutional question being raised, it is necessary for this Court to deny review to this question.

IV

THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE TRIAL COURT SHOULD HAVE SUSTAINED PETITIONER'S OBJECTIONS TO QUESTIONS ASKED OF PETITIONER'S WITNESSES BY THE STATE.

In the State Supreme Court petitioner argued that the trial court should have sustained certain defense objections to questions asked of the witness John Thomas Alford and of petitioner by the State on cross-examination. The questions asked are set forth in the State Supreme Court's opinion, 220 S.E.2d at 298, 299 as well as the reasons that the trial court was not required to sustain those objections. The petitioner has not shown any theory, in the State Supreme Court or in his petition which indicates an abridgement of any constitutional right by the overruling of his objections, wherefore petitioner has presented no question which this Court may review.

V

THE COURT SHOULD NOT GRANT CERIORARI TO DETERMINE WHETHER THE TRIAL COURT IMPROPERLY DENIED PETITIONER'S MOTION IN ARREST OF JUDGMENT.

The petitioner's motion in arrest of judgment was bottomed on the theory that the death penalty imposed on the petitioner is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of North Carolina, having recently decided in exhaustive opinions in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) and State v. Jarrette, 284 N.C. 670, 202 S.E.2d 750 (1974) that the death penalty is neither cruel nor unusual in the Constitutional sense, ruled that it was not error to deny the motion. Pending now before this Court is Fowler v. North Carolina, No. 73-7031, cert. granted 419 U.S. 963 (1974), reargument ordered (June 23, 1975) 43 U.S.L.W. 3674 and Woodson v. North Carolina, No. 75-5491 (cert. granted January 22, 1976) both of which pose the identical issue sought to be raised here. There is no possible position which this petitioner could take which cannot be taken by those petitioners, and no valid purpose would be served by granting further review in the present case.

CONCLUSION

For the reasons given, Respondent, the State of North Carolina, respectfully submits that certiorari should be denied.

Respectfully submitted this the 12th day of February, 1976.

RUFUS L. EDMISTEN
Attorney General

Jean A. Benoy
Deputy Attorney General

David S. Crump
Associate Attorney General

North Carolina Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 829-3786

CERTIFICATE OF SERVICE

The undersigned member of the Bar of the Supreme Court of the United States does hereby certify that he has served a copy of the foregoing BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on petitioner by depositing the same in the United States Mail at Raleigh, North Carolina, first class postage prepaid, addressed to:

T. O. Stennett
Attorney at Law
Room 520 City National Bank Bldg.
Charlotte, North Carolina 28202

Larry Alexander Waddell
835 W. Morgan St.
Raleigh, North Carolina 27603

This the 12th day of February, 1976.

Jean A. Benoy

JEAN A. BENOY
Deputy Attorney General

Counsel for the State of
North Carolina,
Respondent

North Carolina Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-3786